

DEPARTMENT OF STATE REVENUE

04-20160588R.MOD

Memorandum of Decision Number: 04-20160588R
Use Tax
For Tax Year 2016

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Memorandum of Decision.

HOLDING

Boat Club was able to provide sufficient documentation and explanation showing that tangible personal property ("TPP") rented to Taxpayer customers (members) was subjected to sales tax on the amount of monthly membership dues. Taxpayer further provided sufficient documentation that it paid sales tax to the BMV in order to register the TPP in question in Indiana. Accordingly, Taxpayer is entitled to a refund of the amount of sales tax paid to the BMV.

ISSUE

I. Sale Tax—Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-8.1-5-1; IC § 6-2.5-1-21; Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. T.C. 2007); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Chrysler Grp., LLC v. Review Bd. of Ind. Dept. of Workforce Dev., 960 N.E.2d 118 (Ind. 2012); AWHR Am.'s Water Heater Rentals, LLC v. Indiana Dept. of State Revenue, 941 N.E.2d 573 (Ind. T.C. 2010); Mason Metals Co. v. Indiana Dept. of State Revenue, 590 N.E.2d 672 (Ind. T.C. 1992); Bethlehem Steel Corp. v. Indiana Dept. of State Revenue, 597 N.E.2d 1327 (Ind. T.C. 1992); [45 IAC 2.2-3-4](#); [45 IAC 2.2-3-6](#); [45 IAC 2.2-4-27](#); IC § 6-2.5-5-8.

Taxpayer protests the denial of its tax refund claim.

STATEMENT OF FACTS

Taxpayer is a members only boating club operating in Indiana. Taxpayer purchased a boat without paying sales tax at the time of the purchase. Taxpayer went to register the boat in Indiana. The Bureau of Motor Vehicles ("BMV") determined that during the tax year 2016 Taxpayer purchased a boat without paying sales tax at the time of purchase. The BMV required Taxpayer to pay sales tax on the boat in order to register the boat in Indiana. Taxpayer claimed a refund of sales tax from the Indiana Department of Revenue ("Department") because Taxpayer was denied the refund because the Department concluded that the boat in question was not purchased for resale and was not specifically being rented to a customer. Taxpayer argues that it pays sales tax on the membership dues and its boat is exempt from sales tax under the rental exemption. Taxpayer timely protested the refund denial. An administrative hearing was held. This Memorandum of Decision results. Further facts will be supplied as required.

I. Sale Tax—Imposition.

DISCUSSION

Taxpayer requests a refund of sales tax it paid on its purchase of a boat in 2016. The Department determined that no sales tax was paid at the time of the initial sale of the TPP and, therefore, sales tax was properly paid at the BMV when Taxpayer registered the boat. Taxpayer states that it is a boat rental business, operating in Indiana, with customers ("members") who are responsible for paying dues on a monthly basis. The boat at issue was used exclusively for leasing to members. Taxpayer further states that sales tax has been collected and remitted to the State on its members' dues. Dues are paid monthly. Sales tax is applied to the total amount of each customer's membership dues. Taxpayer argues that the TPP has been subjected to sales tax in the form of membership dues, rendering duplicative the sales tax paid by Taxpayer to the BMV. Accordingly, Taxpayer requests a refund of sales tax paid by Taxpayer at the BMV for the TPP in question.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "[t]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. T.C. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[w]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014) (quoting *Chrysler Grp., LLC v. Review Bd. of Ind. Dept. of Workforce Dev.*, 960 N.E.2d 118, 124 (Ind. 2012)). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Also of relevance is [45 IAC 2.2-3-6](#)(a)(2), which states:

The term "watercraft" will include a contrivance used or designed for navigation on water, including a vessel, boat, motor vessel, steam vessel, sailboat, vessel operated by machinery either permanently or temporarily affixed, scow, tugboat, or any marine equipment that is capable of carrying passengers, except a ferry.

The terms "rent" and "lease" are defined in IC § 6-2.5-1-21, which states:

- (a) "Lease" or "rental" means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration and may include future options to purchase or extend. "Lease" or "rental" does not include:
 - (1) a transfer of possession or control of property under a security agreement or deferred payment plan that requires the transfer of title upon completion of the required payments;
 - (2) a transfer of possession or control of property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars (\$100) or one percent (1%) of the total required payments; or
 - (3) providing tangible personal property along with an operator for a fixed or indeterminate period, if:
 - (A) the operator is necessary for the equipment to perform as designed; and
 - (B) the operator does more than maintain, inspect, or set up the tangible personal property.
- (b) "Lease" or "rental" includes agreements covering motor vehicles and trailers in which the amount of consideration may be increased or decreased by reference to the amount realized upon sale or disposition of the property as defined in 26 U.S.C. 7701(h)(1).
- (c) The definition of "lease" or "rental" set forth in this section applies throughout this article, regardless of whether a transaction is characterized as a lease or rental under generally accepted accounting principles, the Internal Revenue Code, the uniform commercial code ([IC 26-1](#)), or other provisions of federal, state, or local law.
- (d) This section applies only to leases or rentals entered into after June 30, 2003, and has no retroactive effect on leases or rentals entered into before July 1, 2003.

(Emphasis added).

[45 IAC 2.2-3-4](#) further explains:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

(Emphasis added).

In addition, [45 IAC 2.2-4-27](#)(a) provides the following:

In general, the gross receipts from renting or leasing tangible personal property are taxable. This regulation [\[45 IAC 2.2\]](#) only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.

The default rule in Indiana is that the income stream from renting or leasing TPP is taxable. In this case, Taxpayer has protested the denial of refund for sales tax paid when Taxpayer registered the boat in Indiana. Since the boat was purchased for rental, it was eligible for the rental exemption. Therefore, no sales tax should have been paid when the boat was purchased.

Of relevance is IC § 6-2.5-5-8, which provides a rental exemption in some circumstances. The relevant portion states:

- (b) Transactions involving tangible personal property other than a new motor vehicle are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property.
- (c) The following transactions involving a new motor vehicle are exempt from the state gross retail tax:
 - (1) A transaction in which a person that has a franchise in effect at the time of the transaction for the vehicle trade name, trade or service mark, or related characteristics acquires a new motor vehicle for resale, rental, or leasing in the ordinary course of the person's business.
 - (2) A transaction in which a person that is a franchisee appointed by a manufacturer or converter manufacturer licensed under [IC 9-23](#) acquires a new motor vehicle that has at least one (1) trade name, service mark, or related characteristic as a result of modification or further manufacture by the manufacturer or converter manufacturer for resale, rental, or leasing in the ordinary course of the person's business.
 - (3) A transaction in which a person acquires a new motor vehicle for rental or leasing in the ordinary course of the person's business.

Also of relevance is the Indiana Tax Court's opinion in *AWHR Am.'s Water Heater Rentals, LLC v. Indiana Dept. of State Revenue*, 941 N.E.2d 573 (Ind. T.C. 2010). In that case, the taxpayer installed water heaters in customers' homes, and in exchange the customers "agreed to pay a monthly fee to AWHR." *Id.* at 574. After an audit, "the Department [of Revenue] determined that AWHR should have collected sales tax from its Indiana customers during the years at issue. More specifically, the Department found that through its Plan, AWHR was leasing tangible personal property to its customers, thereby making the transactions subject to sales tax . . ." *Id.* The Court concluded that the transactions involving water heaters constituted lease transactions, reasoning:

Given the facts of this case, AWHR's customers possessed and controlled the water heaters. Indeed, the water heaters were installed in the customers' homes and businesses. To the extent AWHR claims that it had access to the water heaters at all reasonable times, that access was ultimately controlled by the customer. The customers used the water heaters: by turning on the hot-water tap, they decided when they wanted hot water and how much of it they needed (and, therefore, they controlled the water heater's operation). The customers supplied the water and electricity necessary for the water heaters' operation. Accordingly, the Court finds that AWHR's customers had the requisite possession of, and control over, AWHR's water heaters to characterize the transactions as lease transactions. (Internal citations omitted).

Id. at 576.

Taxpayer's membership agreement states: "A member . . . must be 21 years of age, have signed the contract, and have successfully completed the New Member orientation all prior to being allowed to reserve or operate club boats." The Agreement further states: "Members are expected to return the . . . boat before sunset or scheduled return or closing time unless other arrangements have been previously made through the main office."

The membership agreement also states:

The Member shall be solely and exclusively responsible for any loss or damage to [] boat and accessory equipment from the time that such boat and accessory equipment is furnished to Member up to and including the time of its proper check in to [Taxpayer]. At no time shall Member allow anyone other than a Member to operate any [] boat. . . .

In this case, like the situation in *AWHR*, taxpayer surrendered sufficient control of the watercraft to constitute a "lease" or "rent." Taxpayer members, by the terms of the membership agreement, were the only permitted operators of the watercraft while the watercraft was in use. While customers were required to return the watercraft

to a Taxpayer facility by a specified time, the use of the watercraft while in possession of the member was largely left to the member's discretion and members paid for fuel consumed during their operation of the boat. See *Mason Metals Co. v. Indiana Dept. of State Revenue*, 590 N.E.2d 672, 674 (Ind. T.C. 1992) ("Although sales and use tax is generally applicable under [IC 6-2.5-4-10](#) to leasing arrangements, whether a lease arrangement in fact exists depends on the lessee's possession and control over the property involved.").

Also of relevance is the Tax Court opinion in *Bethlehem Steel Corp. v. Indiana Dept. of State Revenue*, 597 N.E.2d 1327 (Ind. T.C. 1992), *aff'd*, 639 N.E.2d 264 (Ind. 1994). There, the Court stated, "[i]n Indiana, tax consequences generally are determined by the substance rather than the form of a transaction." *Id.* at 1331. In looking at the substance of Taxpayer's membership agreement, the terms point to a rental contract whereby customers pay a membership fee in order to gain access to the opportunity to rent taxpayer's watercraft.

After review of the above-referenced code sections, administrative regulations, and relevant case law, the Department agrees with Taxpayer. Taxpayer has provided sufficient documentation demonstrating that Taxpayer did indeed remit sales tax on the income from the membership dues to the State. The terms of Taxpayer's Membership Agreement, furthermore, prevent members from subletting the watercraft to other users. The Agreement also requires members to return the watercraft to a Taxpayer facility by a certain time, restricting the operation of the watercraft to include only operation by the member using the watercraft. As such, the members use of the watercraft constitute a "lease" under IC § 6-2.5-1-21. Taxpayer, in leasing out TPP to customers, was correct to collect sales tax on the membership dues paid during 2016.

Therefore, since Taxpayer rented the boats to its members, it qualified for the rental exemption under IC § 6-2.5-5-8(b). Due to the fact that dues collected from members have been subject to the Indiana sales tax, and Taxpayer was required to pay sales tax in order to register the boat in Indiana, taxpayer is entitled to a refund in the amount of sales tax paid to the BMV. Taxpayer's customers represent the final users of the TPP and have paid "retail tax . . . at the point of purchase" by paying retail tax on membership dues paid each month. [45 IAC 2.2-3-4](#).

FINDING

Taxpayer's protest is sustained.

Posted: 07/26/2017 by Legislative Services Agency
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